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**IN THE
COURT OF APPEALS OF INDIANA**

JERYL BINGHAM,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0601-CR-46
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Judge Pro-Tempore
Cause No. 49G05-0403-FA-046260

(handdown date)

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Jeryl Bingham appeals his convictions for three counts of Child Molestering,¹ a class A felony, and one count of Child Molestering,² a class C felony. Specifically, Bingham claims that the trial court erred in admitting his confession into evidence and that the prosecutor's act of providing a list of addresses to a witness at trial should have resulted in a mistrial or the exclusion of "tainted witnesses." Appellant's Br. p. 1. Finally, Bingham argues that the trial court abused its discretion in imposing consecutive sentences.

We find that Bingham's confession was properly admitted into evidence and that the trial court properly denied Bingham's motion for a mistrial. However, we conclude that the trial court erred in ordering consecutive sentences. Thus, we affirm in part, reverse in part, and remand this cause to the trial court with instructions to order Bingham's sentences to run concurrently for an aggregate term of twenty-five years.

FACTS

Sometime in 1999, Bingham became romantically involved with Veronica Davis and moved into her Indianapolis home with her children. Bingham was mildly mentally handicapped with an I.Q. of 55. His cognitive abilities were limited and his reading ability was at a second grade level. At some point during their ten-year relationship, Bingham began having sex with one of Davis's daughters—L.D.—who was four years old at the time.

L.D. eventually reported the sexual abuse to Davis and other relatives. Detective

¹ Ind. Code § 35-42-4-3.

² Id.

Gustavia Dodson of the Indianapolis Police Department interviewed L.D., at which time she told the detective that she did not report Bingham's abuse earlier because she was afraid of being taken from her mother. Thereafter, the State charged Bingham with four counts of child molesting for abuse that had occurred at three different times. Count I alleged that Bingham had sexual intercourse with L.D. in 2000 while they were all living in the Meadows apartment complex in Indianapolis. Count II alleged that Bingham had sexual intercourse with L.D. when she was twelve years old, and Count III alleged that Bingham had sexual intercourse with L.D. when she was thirteen years old. Finally, Count IV alleged that Bingham fondled or touched L.D. with the intent to arouse his sexual desires when L.D. was thirteen years old.

On March 17, 2004, Bingham met with Detective Gregory Norris of the Indianapolis Police Department. After being informed of his Miranda³ rights, Bingham admitted to Detective Norris that he had had sex with L.D. on multiple occasions. At some point during the bench trial that commenced on October 13, 2005,⁴ Bingham moved for a mistrial because the prosecutor had provided Davis with a list of her previous home addresses during the last five years. The list, which was generated from Bingham's social security records, had been prepared prior to trial, following the prosecutor's request that Detective Dodson question Davis about her previous addresses. Bingham argued that supplying Davis with the list prejudiced him and violated a separation of witnesses order because it had the effect of

³ Miranda v. Arizona, 384 U.S. 436, 444 (1966).

creating a false impression of consistency between Davis and L.D.’s testimony. The trial court denied Bingham’s motion for a mistrial, and he was found guilty on all counts.

At sentencing, the trial court determined that there were no aggravating factors, and Bingham’s lack of a criminal record was found to be a mitigating factor. As a result, the trial court reduced Bingham’s sentences from the presumptive⁵ thirty-year term to twenty-five years on each of Counts I – III. Bingham was also sentenced to three years on Count IV, which was ordered to run concurrent to Count II. The trial court ordered the sentences on Counts I – III to run consecutively because the instances of abuse constituted separate episodes. Bingham now appeals.

DISCUSSION AND DECISION

I. Admissibility of Confession

Bingham argues that the trial court erred in admitting his confession into evidence. Specifically, Bingham claims that the trial court erred in concluding that his statement was knowing and voluntary when it was demonstrated that “the written waiver form and oral recitation of his rights were both above his comprehension level.” Appellant’s Br. p. 8.

⁴ The trial court also heard evidence on November 23, 2005.

⁵ Indiana’s sentencing statutes were amended by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter “presumptive” sentences to “advisory” sentences. In Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006), trans. denied, a panel of this court determined that the proper sentencing statutes to be applied were those in effect when the defendant had been convicted of the offense, rather than the amended versions that became effective after the conviction but before sentencing. Specifically, the Weaver court observed that “[a]pplication of the amended statutes to persons convicted before the amendments took effect would, we believe, violate the constitutional protections against ex post facto laws.” Id. at 1070. Inasmuch as Bingham committed the instant offenses well before the effective date of P.L. 71-2005, we believe that the rule advanced in Weaver should apply in these circumstances. In accordance with the previous version of the statute, “A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years,

In resolving this issue, we first note that the admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of the trial court's manifest abuse of discretion that results in the denial of a fair trial. Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005). The voluntariness of a confession is to be determined from the totality of the circumstances. Berry v. State, 703 N.E.2d 154, 155 (Ind. 1998). And the State has the burden to prove beyond a reasonable doubt that the defendant knowingly and intelligently waived his right to remain silent. Crain v. State, 736 N.E.2d 1223, 1224 (Ind. 2000). The circumstances that should be considered include whether the confession was freely self-determined and the product of rational intellect and free will, without compulsion or inducement of any sort. Gibson v. State, 515 N.E.2d 492, 494 (Ind. 1987). While a defendant's lowered mental capacity can be viewed as a factor to be examined as part of the totality of the circumstances, that alone does not render a confession involuntary. Crain, 736 N.E.2d at 1224.

When evaluating whether a voluntary confession should be admitted, this court does not reweigh the evidence. Rather, we determine whether the record provides sufficient evidence to validate the trial court's decision. Berry, 703 N.E.2d at 155. Finally, asking a defendant to tell the truth does not constitute a deceptive interrogation technique. Harrington v. State, 755 N.E.2d 1176, 1183 (Ind. Ct. App. 2001).

Here, Bingham contends that because he possessed a "child naivete of the criminal

with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-4.

justice system,” Appellant’s Br. p. 13, the questioning by Detective Norris amounted to undue influence. Although it is not disputed that Bingham has a mental capability lower than the average individual, the record shows that Bingham was informed of his rights both verbally and in writing. Tr. p. 14-15. Before Detective Norris explained Bingham’s rights to him, he asked Bingham if he could read. Ex. 7, p. 15. When Bingham responded that he could not read well, Detective Norris explained why he was being questioned and verbally advised Bingham of the Miranda rights. Ex. 7, p. 15-16. Detective Norris also asked Bingham if he had any questions after explaining the Miranda rights. After explaining the ramifications of signing a waiver, Detective Norris asked Bingham whether he understood the effect of signing a waiver of rights form and whether he had any questions. Id. at 17.

While Bingham maintains that his confession was not knowing or voluntary because he did not fully understand the situation, he does not assert that there was any evidence of threats, violence, or other forms of coercive police activity. Moreover, it is apparent that Detective Norris took great care in informing Bingham of his rights in light of his mental limitations. Ex. 7, p. 15-16. In our view, Bingham’s argument that his confession was not knowingly or voluntarily made is a request for us to reweigh the evidence—an invitation that we decline. That said, we conclude that the trial court did not err in admitting Bingham’s confession into evidence.

II. Mistrial

Bingham next claims that he should have been granted a mistrial. Specifically, Bingham claims that he was entitled to a mistrial because the prosecutor violated the

separation of witnesses order when he provided Davis a list of her previous residences during the trial when a separation of witnesses order was in effect.

We first note that the purpose of a separation of witnesses order is to prevent a witness from gaining knowledge from other witnesses and adjusting her testimony accordingly. Harrington v. State, 584 N.E.2d 558, 562 (Ind. 1992). However, even with a clear violation of an order separating witnesses, the trial court may allow a witness to testify. Jordan v. State, 656 N.E.2d 816, 818 (Ind. 1995). The remedy for a violation rests within the trial court's sound discretion. Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995). The trial court's exercise of discretion with regard to the remedy for violation of a separation order will be disturbed only if there is evidence of prejudice tantamount to an abuse of discretion. Id. When it is unlikely that prejudice occurred because of a violation of a separation of witnesses order, the trial court's ruling will not be disturbed. Clark v. State, 480 N.E.2d 555, 585 (Ind. 1985).

We further note that the granting of a mistrial is within the trial court's discretion and will be overruled only if there is an abuse of discretion. Thomas v. State, 840 N.E.2d 893, 901 (Ind. Ct. App. 2006), trans. denied. To prevail on appeal, the defendant must prove that the questioned information or event was so inflammatory or prejudicial that it put him in a position of grave peril to which he should not have been subjected. Id.

In this case, the evidence showed that, prior to trial, Detective Dodson—a witness for the State—had prepared a list of L.D. and Davis's residences over the past five years. Tr. p. 251. As noted above, the list was created after the prosecutor directed Detective Dodson to

“get with [Davis] about those addresses and make sure that she, you know, she knows exactly where they lived.” Tr. p. 258. The list was not prepared on the basis of L.D.’s testimony. Rather, the addresses were compiled from Bingham’s social security records. Id. at 251. The list was then provided to both L.D. and Davis, and Bingham’s counsel objected, claiming that Davis was not permitted to refer to the list when testifying. Bingham moved for a mistrial, and the trial court denied the motion. Bingham now maintains that Detective Dodson’s research and subsequent communication with Davis at trial violated the trial court’s separation of witnesses order and created a “false impression of consistency between Davis and L.D.’s testimony.” Appellant’s Br. p. 17.

Notwithstanding this contention, the evidence shows that L.D. had already testified when she received the document. Id. at 254. There was no evidence that Davis and L.D. spoke to each other, exchanged any information, or saw each other testify. Moreover, Bingham makes no showing that Davis’s receipt of the document in any way altered her testimony. And, even though Bingham claims that he was prejudiced by these actions, he did not move to strike Davis’s pertinent testimony when the trial court afforded him the opportunity to do so. As a result, Bingham has failed to show any prejudice that resulted from the prosecutor’s actions in supplying Davis with a list of her previous addresses. Thus, Bingham’s claim of error fails, and the trial court properly denied his request for a mistrial.

III. Sentencing

Finally, Bingham claims that he was improperly sentenced. Specifically, Bingham contends that he should have been sentenced only to concurrent terms of incarceration

because the trial court found no aggravating circumstances and determined the existence of one mitigating factor.

In resolving this issue, we initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). Those decisions are given great deference on appeal and will only be reversed for an abuse of discretion. Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003). When the trial court imposes a sentence other than the presumptive sentence, we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999). In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravating factor may support the imposition of both an enhanced and consecutive sentence. Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006), trans. denied.

In this case, the trial court specifically observed at the sentencing hearing that there was “nothing legally aggravating that is acceptable at this point in the law to enhance the sentence or even to assert as aggravation.” Tr. p. 281. The trial court then identified Bingham’s lack of criminal history as a mitigating factor. Id. at 282. In light of these findings, we note that in Marcum v. State, 725 N.E.2d 852 (Ind. 2000), the defendant was sentenced to seventy-one years and received the presumptive term for murder, attempted

murder, and conspiracy to commit burglary. He also received the minimum sentence for theft and the maximum sentence for auto theft. While the trial court identified a single mitigating factor, and initially finding no aggravating circumstances, the trial court ordered some of the sentences to be served consecutively. Id. at 863. However, when ordering consecutive sentences, the trial court commented that “[t]his was a series of incidents, events, or occurrences, a crime of spree.” Id. at 864. On appeal, our Supreme Court remanded the case to the trial court with instructions to impose concurrent sentences on all counts, holding that because the trial court found the aggravators and mitigators to be in balance, there was no basis on which to impose consecutive terms. Id. at 864.

As in Marcum, there was no basis for the trial court here to impose consecutive sentences upon Bingham, given the absence of aggravating circumstances and the existence of one mitigating circumstance. As a result, we are compelled to vacate Bingham’s sentences and remand this case to the trial court with instructions that it impose concurrent sentences on all counts.⁶

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions that the trial court order concurrent sentences for an aggregate term of twenty-five years.

⁶ As an aside, we note that had the trial court identified the fact that Bingham committed these multiple and horrendous offenses over a ten-year period with the same victim as an aggravating factor and had further concluded that the aggravating factors outweighed the mitigating circumstances, the imposition of enhanced and/or consecutive sentences may very well have been appropriate in this case.